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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~100~~ 59

UNITED STATES OF AMERICA, *Petitioner,*
against
FIRST NATIONAL CITY BANK, *Respondent,*
and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES & CO.;
LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING CORP.; BEL-
GIAN-AMERICAN BANK AND TRUST CO., and FIRST NATIONAL
CITY TRUST CO.,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK, THE
FIRST NATIONAL BANK OF BOSTON and BANK OF AMER-
ICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AS
AMICI CURIAE, IN OPPOSITION TO THE PETITION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 998

UNITED STATES OF AMERICA,
Petitioner,
against

FIRST NATIONAL CITY BANK,
Respondent,
and

OMAR, S. A., a Uruguayan corporation; LAZARD FRERES &
CO.; LEHMAN BROTHERS; BELGIAN-AMERICAN BANKING
CORP.; BELGIAN-AMERICAN BANK AND TRUST CO., and FIRST
NATIONAL CITY TRUST CO.,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**JOINT BRIEF FOR THE CHASE MANHATTAN BANK,
THE FIRST NATIONAL BANK OF BOSTON and BANK
OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION, AS AMICI CURIAE, IN OPPOSITION TO
THE PETITION**

Opinions Below

The opinion of the United States District Court for the
Southern District of New York is reported as 210 F. Supp.
773. The opinion of the United States Court of Appeals

for the Second Circuit, and the dissenting opinion (App. A of Petition) are reported at 321 F. 2d 14. The *per curiam* opinion of the Court of Appeals (App. B of Petition), sitting *en banc* on rehearing, is not reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether for the purpose of aiding the Government in collecting taxes allegedly owed by an alien, a United States District Court has the power to order the freezing, and ultimate transfer to the United States, of an alien's funds on deposit outside the United States with a foreign branch of an American bank, when the alien has no right to obtain payment of the funds in the United States.

Statutes Involved

The pertinent statutes are set forth in Appendix D of Petition.

Statement

The action was brought by the Government, the petitioner herein, against defendant Omar, S. A., First National City Bank ("Citibank") and the other defendants named above. The complaint alleged that defendant Omar was indebted to the United States for unpaid taxes, penalties and interest. It prayed for injunctive relief against Citibank and the other defendants, alleging that they held property of Omar encumbered by Federal tax liens. In

addition to its prayer for an injunction *pendente lite* ordering the defendants to refrain from disposing of Omar's property, the Government sought an order compelling those defendants to return all property and property rights of Omar, including any sums held abroad for the account of Omar in foreign branches of defendant banks, to the jurisdiction of the United States District Court for the Southern District of New York.

The District Court granted the Government's motion for temporary relief against all defendants (except First National City Trust Co. and Belgian-American Bank & Trust Co. which had shown satisfactorily that they did not hold property of Omar), ordering them to refrain from disposing of any property or rights to property held for Omar's account by defendants or their branches, agents or nominees, whether or not their branches, agents or nominees were located within the United States.

Defendant Citibank, the respondent herein, appealed from so much of the District Court's order as restrained the disposition of any property of Omar held outside of the United States by Citibank's foreign branches. On June 26, 1963, the Circuit Court sustained the appeal (one Judge dissenting), vacated the District Court's order in part and remanded the case for modification of the injunction. On September 19, 1963, the Circuit Court granted the Government's petition for a rehearing *en banc*. On January 13, 1964, the Circuit Court adhered to its prior decision, reversing the District Court, by a vote of 4-3.

Because of the importance of this case to the foreign operations of American banks in general, The Chase Manhattan Bank, The First National Bank of Boston, and Bank

of America National Trust and Savings Association sought, and obtained, the consent of the attorneys for the Government and Citibank to submit this joint brief, as *amici curiae*.

REASONS FOR DENYING THE PETITION

I

The Decision Below is Supported by All Applicable Authority.

The District Court had no jurisdiction to issue orders affecting the disposition of funds deposited outside the United States with a foreign branch of an American bank. Such was the holding of the Circuit Court.

Even in the dissenting opinion in the Court below, it was conceded that the Court did not in any sense have jurisdiction over the *res*. The law of New York, controlling on this point, is clear that a depositor of a foreign branch of a bank with its head office in New York has no right to obtain payment of the deposit in New York, but only where the branch is located, and that foreign branch deposits are not subject to attachment or execution by service of process on the head office in New York (See cases cited in App. A to Petition, pp. 27-34). Thus, in the present case, since the District Court had no jurisdiction over Omar and the only debtor, the foreign branch, was outside of the United States, the District Court had no power to affect the disposition of the debt. See *Hansen v. Denckla*, 357 U. S. 235 (1958). The issuance of the order by the District Court was beyond its jurisdiction, and the modification ordered by the Circuit Court was required.

The dissenting opinion of the Circuit Court failed to cite any contrary authority and, in fact, there is none. The dissent, as well as the Government, put aside long-estab-

lished legal principles governing foreign branch deposits and the policy justifications for such principles. They urged inapplicable cases in which the court had jurisdiction over the taxpayer, or over the *res*, with the result that the court's judgment controlled and protected the parties. In this case, on the other hand, the Court had no jurisdiction over the taxpayer or over the *res*. Moreover, it had no jurisdiction over the only debtor, the foreign branch which cannot be protected either by the court or its judgment.

II

The Decision Below is Entirely Consistent with United States Foreign Policy.

Aside from the fact that the Government seeks to extend the jurisdiction of the Courts of the United States to foreign assets of an alien taxpayer, this case involves serious questions with respect to United States foreign economic policy. The decision of the Circuit Court is totally consistent with the aims of that policy.

There really can be no question but that a contrary decision, freezing funds of foreign customers deposited in foreign branches of American banks and ultimately ordering their transfer to the United States, would deter the establishment, and continued maintenance, of such foreign branch deposits and, consequently, impair the successful operation of foreign branches. It would thus be in direct conflict with the avowed Congressional and Executive policy of encouraging foreign branch operations, and adversely affect the American international balance of payments.

Congress recognized the vital place of foreign branches in a sound American banking system at the very inception

of the Federal Reserve System. The Federal Reserve Act makes explicit provision for the establishment of American banking machinery in foreign countries and, by limiting restrictions to a minimum, affords the broadest opportunity for this type of export of American business.

In 1962, Congress evidenced its continued vital interest in this area through the enactment of P. L. 87-588, 76 Stat. 388 (1962), which amended the Federal Reserve Act to free foreign branches from many of the restrictions on United States domestic banking and to permit them to engage in banking on a par with indigenous institutions. This legislation, designed to improve the competitive position of these branches, was the direct result of a recommendation made by the Board of Governors of the Federal Reserve System. See **LEGISLATIVE RECOMMENDATIONS OF THE FEDERAL SUPERVISORY AGENCIES TO THE SENATE COMMITTEE ON BANKING AND CURRENCY, Study of Banking Laws (Comm. Print, 1956), p. 111.** The legislative history of P. L. 87-588 demonstrates a clear Congressional policy favoring effective foreign branch banking as an instrument to ease the problems of balance of payments and gold outflow. See S. Rep. No. 738, 87th Cong., 1st Sess. p. 2 (1961). See also H. R. Rep. No. 2047, 87th Cong., 2d Sess. (1962).

The continued vital role of foreign branch banking in the United States economy has been heavily underscored in recent reports to the Executive Branch. See, *e.g.*, **ADVISORY COMMITTEE ON BANKING TO THE COMPTROLLER OF THE CURRENCY, REPORT, National Banks and the Future (1962), p. 130; COMMISSION ON MONEY AND CREDIT, REPORT, Money and Credit (1961), p. 212.** Such reports noted the value of foreign banking operations in stimulating world trade and investment, in strengthening the American position with

respect thereto, and in reducing the drain on dollar funds by enabling American corporations to finance, in part, their own overseas activities through local currency deposits with foreign branches of American banks.

The fostering of foreign branches is thus a policy of Congress and the Executive Branch. A decision contrary to that of the Circuit Court would conflict with those clearly expressed national policies.

The Government argues that the opinion of the Circuit Court "creates evident temptations and possibilities for evasion" (Petition, p. 8). This contention, however, was answered by the Circuit Court. The Court noted:

"The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home." (App. A to Petition, p. 39).

The day-to-day experiences of the Banks represented by the undersigned underscore and support this answer. The concern of the American banks engaged in international banking is not to protect the "artful tax dodger" who, through one artifice or another available in the international scene, will not be stopped by any *tour de force* concocted in this case. American international banking is, on the other hand, concerned with the many responsible individuals in commercial and industrial establishments abroad who have business contacts with the United States and are repelled by the extraordinary complexities of our tax system. Faced with uncertainty, they may well elect to avoid the risk of unwitting entanglements that might flow

from doing business with the foreign branch of an American bank. The Government asserts that the Treasury Department is planning to limit enforcement suits with respect to foreign branch deposits to situations in which the Internal Revenue Service has reason to believe tax evasion is afoot (Petition, p. 19). It should be noted that on the very day that the Petition herein was mailed, the Internal Revenue Service, oddly enough, issued a release substantially to the above effect (I.R.S., Tech. Inf. Rel. 571, April 13, 1964).¹ This release is, of course, grounded on an erroneous assumption of legal rights—that the Government can reach the assets of a taxpayer when both the taxpayer and the assets are beyond the jurisdiction of United States Courts (See Pt. I above). Further, its limiting language will not assuage the fears of the innocent or protect them from over-zealous tax collectors, and cannot cure, at this late date, the policy objections to the Government's position. Moreover, this belated indication of apparent self-restraint must be viewed with caution in light of the broad powers for which the Government seeks judicial sanction in this proceeding.

¹ "The U. S. Internal Revenue Service today announced that regulations will be issued limiting the authority of the Commissioner to take or authorize administrative or legal action to attach bank deposits payable at a foreign office of a bank doing business in the United States. Generally, the regulations will confine a levy enforcement or a tax lien foreclosure action on bank deposits of a person believed to be beyond the jurisdiction of a United States court to deposits payable at banking offices located in the United States, except where the Internal Revenue has reason to believe that funds have been transferred from the United States to hinder or delay collection of United States taxes.

"Internal Revenue Service said that the regulations will provide appropriate notice procedure so that a bank will easily recognize a levy or lien foreclosure proceeding intended to reach a deposit payable at a foreign office."

The Circuit Court refused to adopt a rule of law that would be repugnant to the principles of sound economic policy while gaining nothing in terms of tax administration. No other decision was possible.

III

The Decision Below Recognizes the Dangers to American Banks Inherent in the Government's Position.

Compliance with an order directing an American bank to freeze the deposit of a customer in an overseas branch or to transfer it to the United States would expose the bank to substantial, possibly even double, liability, since compliance would not excuse it, under the applicable foreign law, from liability to the depositor for the full amount of the deposit. Thus, in effect, if the Government's position were sustained, an American bank, which is not the taxpayer and is wholly innocent and in no way a party to any controversy between the Government and its depositor, might be compelled to pay, from its own resources, the tax alleged to be due.

The Government suggests (Petition, p. 18) that if the American bank were compelled by a foreign court to repay the depositor, it might have a constitutional right to recoup from the Government to the extent of its double payment. See *Cities Service Co. v. McGrath*, 342 U. S. 330, 335 (1952). But even if there is such a theoretical constitutional right, in order to claim it, the bank would have to refuse its depositor's demand, deny and litigate liability in a suit in a foreign court, with consequent legal expenses and damage to its community standing, and after losing, bring an action against the Government to recover the very amount which

the Government collected previously. The entire maneuver would be nothing more than an exercise in futility at the expense of the bank's reputation and corporate funds. Moreover, even the Government does not contend that legal expenses, or any penalties imposed by the foreign government for acts compelled by the American court, would be recoverable from the United States.

Citibank is not accused of being derelict in meeting its tax obligations. The Circuit Court properly recognized that the effect of acceding to the Government's position would be to subject the bank, a stranger to the tax controversy herein, to potential double liability. The impropriety of such a decision is made even more clear by recognition of the fact that it will not prevent the tax dodger from transferring his balances to any one of the many very substantial foreign banks or otherwise enhance the effectiveness of the Federal tax collection process to any degree.

Conclusion

As the decision of the Circuit Court is supported by unassailable authority, is entirely consistent with American foreign economic policies and reflects proper concern for the rights of innocent parties, the petition for a writ of certiorari should be denied.

May 13, 1964

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